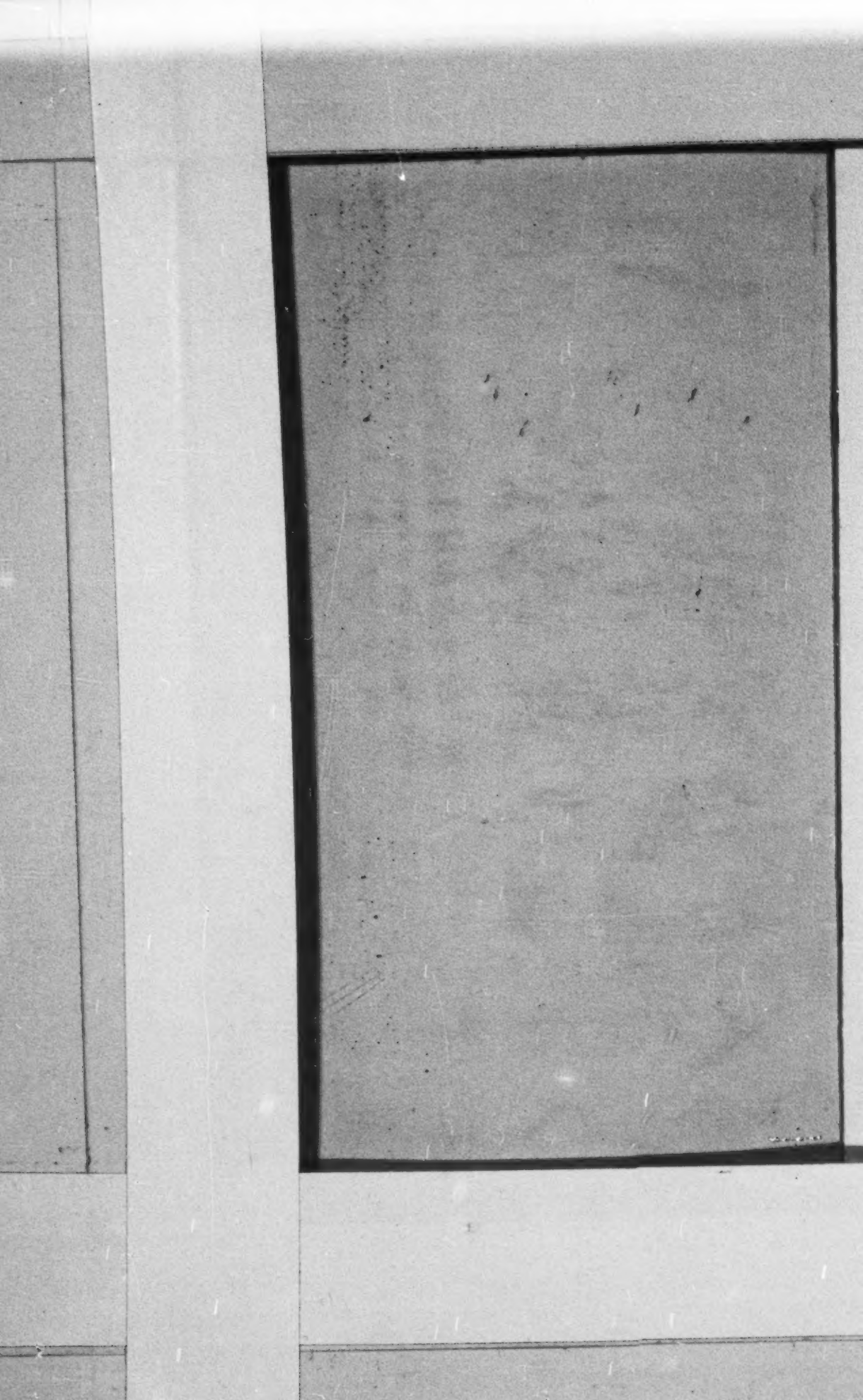

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Supreme Court of the United States

October Term, 1972

No. 72-1154

In the Matter

of

BLAIR & CO., INC.,

Debtor.

JOHN P. FOLEY, JR., J. P. FOLEY & CO., INC. and ANITA SALISBURY,

Petitioners,

against

BLAIR & CO., INC. and PATRICK E. SCORESE, as Liquidator appointed by the New York Stock Exchange, Inc. for BLAIR & CO., INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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MEMORANDUM OF RESPONDENTS SUGGESTING THAT THE CAUSE IS MOOT

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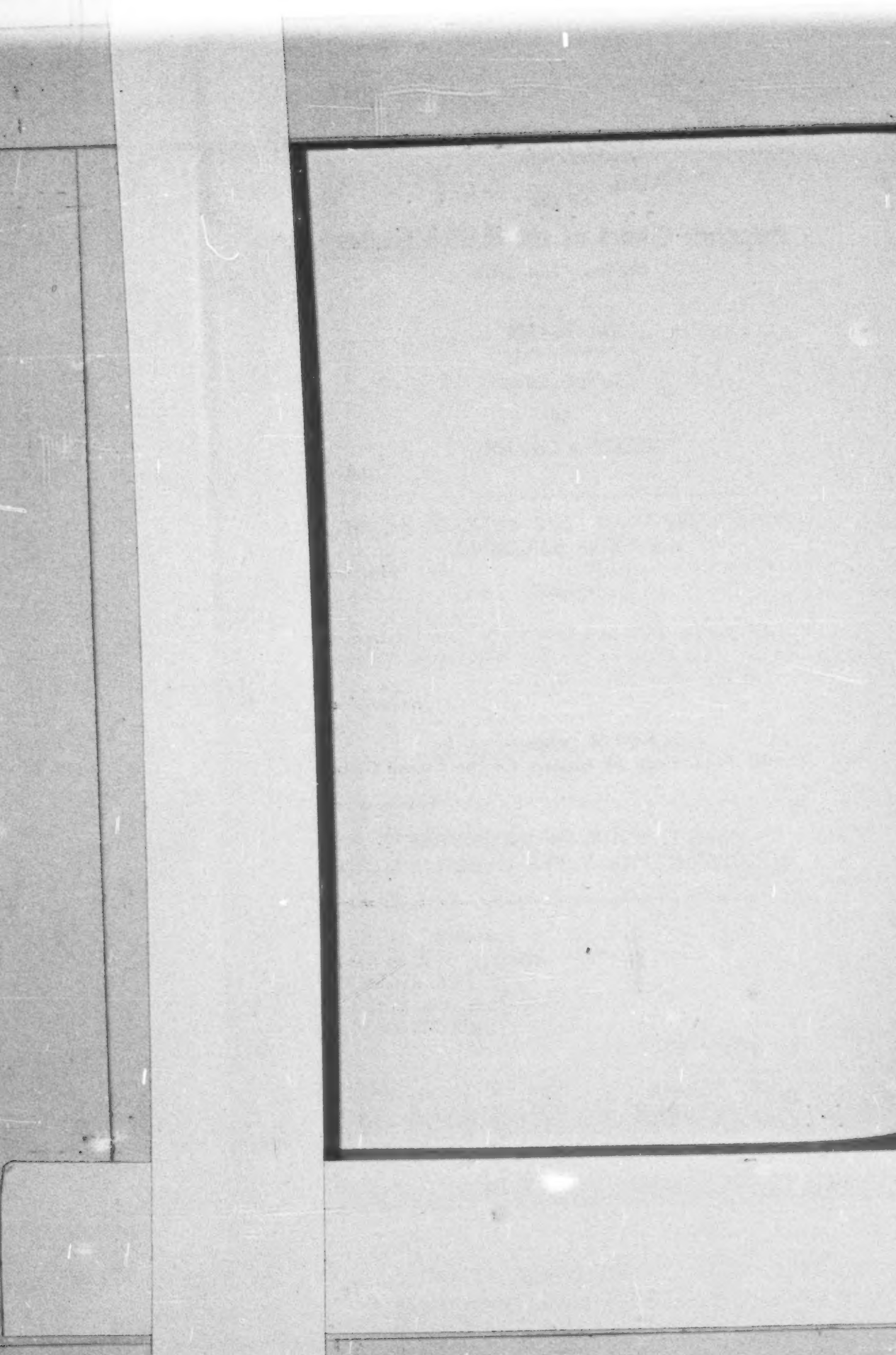

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MEMORANDUM OF RESPONDENTS SUGGESTING THAT THE CAUSE IS MOOT

Respondents herein submit this memorandum to apprise the Court of certain facts which render this cause moot.

The question presented by Petitioners is as follows:

> Is the consensual appointment of a liquidating agent, who is not vested with title to the debtor's property and whose appointment does not affect the rights of creditors, the commission of an act of bankruptcy under Section 3a(5) of the Bankruptcy Act, 11 U.S.C. §21a(5)?

The determination of the foregoing question is wholly academic in the present circumstances of Blair & Co., Inc. ("Blair"). As stated at pages 12-16 of Respondents' Brief, the involuntary bankruptcy proceedings instituted against Blair by the Petitioners were superseded by the debtor's commencement of proceedings for an arrangement under Chapter XI of the Bankruptcy Act (the "Act"), 11 U.S.C. §701, *et seq.*, on April 15, 1971. Thereafter, such proceedings were prosecuted in accordance with the provisions of the Act. After acceptance of the Chapter XI arrangement by the requisite majority of unsecured creditors, the bankruptcy court entered an order on October 2, 1973 confirming the arrangement proposed by the debtor. The order of confirmation provides, *inter alia*:

> "The debtor [Blair] herein, by confirmation of the arrangement, be, and it hereby is, discharged from all of its unsecured debts and liabilities provided for by the arrangement or in this order, but excluding such debts as under Section 17 of the Bankruptcy Act are not discharged."

Thus, Blair was discharged from its unsecured debts and liabilities as a result of the confirmation of its arrangement. See Section 371 of the Act, 11 U.S.C. §771; *In re Kornbluth*, 65 F.2d 400, 402 (2d Cir. 1933).

No appeal was taken from the order of confirmation. It is therefore final and binding upon all creditors of Blair. Section 367(1) of the Act, 11 U.S.C. §767. By virtue thereof, all bankruptcy proceedings involving Blair have been terminated and a determination of the question presented by Petitioners will be of no consequence or effect. Whether Blair did or did not commit the act of bankruptcy asserted by the Petitioners is thus moot.

The conclusive effect of an arrangement under Chapter XI of the Act

> "* * * may be compared in result to a decree of adjudication in bankruptcy. An adjudication in bankruptcy is a judgment *in rem*, a determination of the debtor's status as a bankrupt, binding upon all parties in interest. * * * Similarly, an order confirming an arrangement is a judgment *in rem*, a determination of the rights and liabilities created by the arrangement, binding upon all parties in interest, whether or not they appeared."

9 Collier, Bankruptcy, ¶9.25 at 336-337 (14th Ed. 1972).

Section 70i of the Act, 11 U.S.C. §110i, provides in pertinent part that "[u]pon the confirmation of an arrangement * * *, the title to the property dealt with shall revest in the * * * debtor, or vest in such other person as may be provided by the arrangement. * * *" Thus, in the case of Blair, on October 2, 1973, the property of the debtor passed from the custody of the court in accordance with the provisions of the confirmed arrangement and is now no longer subject to the jurisdiction of the bankruptcy court. In *In re Rubins*,* the essence of the applicable principles was stated as follows:

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*74 F.2d 432, 434 (7th Cir. 1934), *cert. denied*, 295 U.S. 758 (1935) (decided under former Section 12 of the Act).

> "The composition, *upon confirmation, supersedes bankruptcy proceedings,* revests title in the bankrupt, and has the *effect of full administration in bankruptcy.*" [Emphasis supplied.]

Accord, 9 Collier, *supra,* ¶9.33 at 409.

Accordingly, by reason of the consummated Chapter XI proceedings, Blair has undergone a full administration in bankruptcy as contemplated by the Act. The question presented is, therefore, only of academic interest. There is no real or pending controversy presented which will determine rights of litigants in this proceeding.

It is respectfully submitted that the Petitioners are requesting the court to rule upon an abstract question which can have no impact upon the instant matter. In *International Shoe Co.* v. *Smith-Cole, Inc.,** the Court of Appeals stated the applicable principle in the following manner:

> "Courts are organized to adjudicate controversies of substance, and not to declare abstract rules of law. • • • Courts have enough to do in passing on substantial controversies without wasting their time in superintending the transfer of money from one pocket of another. • • • The long and short of the matter is that this proceeding is aimed at a dissipation, and not the conservation, of the [debtor's] estate. • • • The process of the courts cannot be used to enforce contracts infected with champerty or maintenance; nor can they be used for that purpose in this more direct manner.
>
> The avowed purpose of the suit being to assert an abstract right at the expense of the creditors, and that

*62 F.2d 972, 974 (10th Cir. 1933).

being its inevitable result, the action was properly dismissed."

This Court has declined to exercise jurisdiction over controversies seeking to resolve wholly academic questions. *Golden* v. *Zwickler*, 394 U.S. 103, 109 (1969); *Hall* v. *Beals*, 396 U.S. 45 (1969).

Respondents respectfully suggest that in view of the applicable facts, the question presented by Petitioners is moot and the appeal should be dismissed on the ground that the petition for certiorari was improvidently granted.

Respectfully submitted,

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October 26, 1973